

IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00112 COA

JOHN DELAHOUSAYE

APPELLANT

v.

MARY MAHONEY'S INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

BRIDGES, P.J., DISSENTING:

Believing the majority to be in error, I respectfully dissent. Under Mississippi Rule of Civil Procedure 56, a movant is not entitled to summary judgment unless he can demonstrate that there are *no genuine issues of material fact* and that he is entitled to *judgment as a matter of law*. *Canizaro v. Mobile Communications Corp. of Am.*, 655 So. 2d 25, 28 (Miss. 1995) (emphasis added). This Court conducts de novo review of summary judgments entered by lower courts to determine whether genuine issues of material fact exist. In doing so, the non movant is given the benefit of all reasonable inferences and interpretations which the facts may support. *Clark v. St. Dominic-Jackson Memorial Hosp.*, 660 So. 2d 970, 972 (Miss. 1995); *Dennis v. Searle*, 457 So. 2d 941, 944 (Miss. 1984). Further, the Mississippi Supreme Court has emphasized that a motion for summary judgment "should be overruled unless the trial court finds, *beyond any reasonable doubt*, that the plaintiff would be unable to prove any facts to support his claim." *Ales v. Ales*, 650 So. 2d 482, 484 (Miss. 1995) (emphasis added).

Here, there is much conflicting testimony as to whether Ronald Martin bought beer from Mary Mahoney's. His girlfriend, Tracy Collins, testified that she saw Martin drinking beer at Mary Mahoney's. This fact is undisputed, and in my opinion, crucial to this case. Moreover, Martin testified that he was drinking beer at Mary Mahoney's. This testimony was not recanted. Collins further testified that she bought beer from Mary Mahoney's for Martin. Additionally, Mark Inabinette, a witness at the scene of the accident testified by affidavit that he was one of the first witnesses to arrive at the accident scene and that at no time did he observe Martin in possession of an

ice chest, nor did he see Martin throw anything over the side of the bridge. Inabinette's affidavit corroborates Collins testimony completely. It is not for the trial court to decide which of the witnesses is telling the truth, or give greater weight to the testimony of certain witnesses.

Our supreme court has held that summary judgment is inappropriate when there are undisputed facts which are susceptible to more than one interpretation, such as the case here. In *Dennis v. Searle*, the court stated:

Issues of [material] fact, as a matter of proper construction of Rule 56, also exist where there is more than one reasonable interpretation that may be given undisputed testimony, where materially differing but nevertheless reasonable inferences may be drawn from the uncontradicted facts

Dennis v. Searle, 457 So. 2d 941, 944 (Miss. 1984); *American Legion Ladnier Post Number 42, Inc. v. City of Ocean Springs*, 562 So. 2d 103, 106 (Miss.1990) (holding that in doubtful cases trial court should err on side of denying summary judgment). As stated previously, this Court conducts de novo review of summary judgments awarded by trial courts. *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988). Furthermore, should it determine that the undisputed facts can support more than one interpretation, the Court will not hesitate to reverse and remand for a trial on the merits. *Canizaro*, 655 So. 2d at 29. Should we find that issues of material fact exist, or if the undisputed facts can support more than one interpretation, the Mississippi Supreme Court has mandated that we reverse the summary judgment and remand for a trial on the merits. *Id.*

As the majority stated, Delahoussaye must prove that Mary Mahoney's sold or *otherwise furnished* Martin alcoholic beverages. Collins testified on three separate occasions that she bought beer at Mary Mahoney's and gave it to Martin. She saw him drinking beer from a Mary Mahoney's cup. She further testified that she believed he bought beer, although she never saw him buy beer. Both Martin and Collins were underage at the time. Additionally, Martin never said that he had not bought beer at Mary Mahoney's --only that he had no recollection of purchasing or being furnished beer there because he was extremely intoxicated from smoking marijuana and drinking beer.

I believe from the contradicted testimony that a genuine issue of material fact existed in this case, and the trial court erred by granting a summary judgment to Mary Mahoney's. I would therefore reverse and remand this cause for a hearing on the merits.

KING AND PAYNE, JJ., JOIN THIS SEPARATE WRITTEN OPINION.